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IN THE

Supreme Court of the United States

No. 78-90

DANIEL BURCH and WRESTLE, INC.,

Petitioners,

—v.—

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, *AMICI CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
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vs.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, AMICI CURIAE

Interest of Amici Curiae */

American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to the protection of the rights enumerated in the Bill of Rights. It is particularly concerned with the fair operation of the criminal justice system, and during its 58-year

*/ Letters from all parties consenting to the filing of this brief have been filed with the Clerk of the Court.

history has stressed the need for the fullest protection of the Constitutional right of trial by jury.

Recent social science scholarship, relied on by the court in Ballew v. Georgia, 435 U.S. 223 (1978), suggests that the factual premises underlying this Court's decisions permitting a reduction in jury size, Williams v. Florida, 399 U.S. 78 (1970), and decisions by less than unanimous juries, Apodaca v. Oregon, 406 U.S. 404 (1972), may have been in error. Moreover, recent historical scholarship also suggests that the number twelve was no mere historical accident, but was an essential part of the jury right: indeed, in the first recorded instance of judicial review in the United States, in 1779, the New Jersey Supreme Court held that a reduction in jury size to less than twelve was "unconstitutional," violating "the right of trial by jury."

We submit this brief to provide the Court with these studies.

Because five to one jury verdicts in criminal cases do not offer defendants the protections of the right to jury trial as established by the Founders - including accuracy, consistency, fairness, and fair representation - amici urges that the judgment of the Louisiana Supreme Court be reversed.

STATEMENT OF THE CASE

Petitioners, an individual and a Louisiana corporation, were convicted of violating the Louisiana obscenity statute, LSA R.S. 14:106, for showing coin-operated movies in New Orleans, alleged to be obscene. The jury found the individual defendant Burch guilty by a five to one vote and the corporate defendant guilty by a unanimous vote. Burch was sentenced to two consecutive seven-month prison terms, which were suspended by the Court, and fined $1,000.

On appeal to the Louisiana Supreme Court, the convictions were affirmed. On the issue of the proportion of the jury needed to convict, the Louisiana Supreme Court found Johnson v. Louisiana dispositive regardless of jury size:

> If 75 percent concurrence (9/12) was enough for a verdict as determined in Johnson v. Louisiana, 406 U.S. 356 (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of Johnson. Hargrave, The Declaration of Rights of the Louisiana Constitution of 1973, 35 La.L.Rev. 1, 45 (fn. 300)(1974).
>
> We accept this view as still valid, despite the recent decision in Ballew v. Georgia, 435 U.S. 223 (1978).

Appendix to Petition for Certiorari (hereinafter cited as Pet.App.)at 13a.

And, having ruled that this Court's analysis and decision in Ballew were irrelevant to the question of the percentage of jurors necessary to convict, the Court rejected petitioners' contention that Ballew foreclosed verdicts by less than six jurors:

> [I]n Williams, the court had held that a six-person jury was of sufficient size to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. These values which Ballew held a five-person jury is inadequate to serve, are not necessarily defeated because the six-person jury's verdict may be rendered by five instead of by six persons.
>
> The six-person jury will still presumably engage in the longer deliberations involving more communication that the court found adequately enhances greater verdict reliability and better community representation, despite (see Johnson) the elimination of the requirement for unanimity in verdict. Or at least this court, indulging in the presumption of federal constitutionality which must be afforded to provisions of our state constitution, so concludes as to this close issue.
>
> Pet. App. at 14a-15a.

SUMMARY OF ARGUMENT

The first Congress viewed the right of trial by jury as necessarily requiring a jury of twelve persons. Three leading figures in the first recorded instance of judicial review of a state constitution, in which the New Jersey Supreme Court held a provisions for juries of six persons "unconstitutional" as violative of the New Jersey Constitution providing for "the right of trial by jury," were also principals in the Constitutional Convention and in the first Congress. They would hardly have remained silent if a principle so recently controversial in their own state was being overturned in Philadelphia. Williams v. Florida, 399 U.S. 78 (1970), should be overruled. (Point I.A.).

Reduction of the jury from twelve to six undermines each of the four central purposes of the jury trial right recognized in Williams v. Florida, supra, and Ballew v. Georgia, 435 U.S. 223 (1978). (Point I.B.).

Unanimity was viewed by the Framers as an essential attribute of the historical right of trial by jury, and was incorporated into the constitutional provision securing the right. A majority of this Court has steadfastly agreed. Johnson v. Louisiana,

406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972), should be overruled. (Point I.C.).

Elimination of the requirement of jury unanimity also undermines each of the purposes and functions of the jury system. (Point I.D.).

Even if the Court declines to reconsider its previous decisions sanctioning the six-person jury and the non-unanimous jury, a five to one verdict of a six-person jury undermines exponentially the purposes and functions of the jury system, and is not a "jury verdict" within the meaning of the Sixth and Fourteenth Amendment guarantees. (Point II).

ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS HOLDINGS IN WILLIAMS V. FLORIDA, JOHNSON V. LOUISIANA, AND APODACA V. OREGON, AND SHOULD RE-ESTABLISH THE NECESSITY, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, FOR TWELVE-PERSON JURIES ACTING UNANIMOUSLY IN CRIMINAL CASES.

A. The Sixth Amendment Right To Trial By Jury Guarantees A Jury Of Twelve Persons.

In Williams v. Florida, 399 U.S. 78 (1970), the court upheld the constitutionality of six-person juries, calling the selection of the number twelve a "historical accident" in the development of the common law jury. Id. at 89. Amici submit that a more complete examination of the historical record discloses that view to have been in error. 1/

The Williams court relied heavily on changes made in the wording of the Sixth Amendment after it was first introduced by Madison in the House of Representatives.

1/ Here, as in Monell v. New York City Department of Social Services, ___U.S. ___, 56 L.Ed. 611 (1978), a candid reappraisal of "the weakness of the historical evidence [previously] relied on" justifies departure from the rule of stare decisis. Id. at 644 (Powell, J., concurring). Indeed, this case is a fortiorari, for stare decisis has less force in constitutional adjudication than in statutory analysis. Id. at 638.

The original Madison proposal provided:

> The trial of all crimes shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.
>
> Williams v. Florida, supra at 94.

After the House passed this proposal, the Senate changed the wording because of its objection to the concept of the "vicinage." Madison explained the problem in a letter to Edmund Pendleton, dated September 14, 1789. The letter read in part:

> The Senate have sent back the plan of amendments with some alterations which strike, in my opinion, at the most salutary articles. In many of the States, juries, even in criminal cases, are taken from the State at large: in others, from districts of considerable extent; in very few from the County alone. Hence a dislike to the restraint with respect to vicinage, which has produced a negative on that clause, * * * Several others have had a similar fate. Letter from James Madison to Edmund Pendleton, September 14, 1789, in 1 Letters and Other Writings of James Madison 491 (1865).
>
> Id. at 95, n. 39.

After a conference committee considered the matter, the Amendment was re-worded in its present form, which does not mention freeholders, unanimity or vicinage, or the

"accustomed requisities" of the jury. This Court concluded:

> ... Such action is concededly open to the explanation that the "accustomed requisites" were thought to be already included in the concept of a "jury." But that explanation is no more plausible than the contrary One: that the deletion had some substantive effect. Indeed, given the clear expectation that a substantive change would be effected by the inclusion or deletion of an explicit "vicinage" requirement, the latter explanation is, if anything, the more plausible. Id. at 9

Amici respectfully submit that the re-wording is an insufficient basis on which to conclude that Madison and the other Founders intended to reject 400 years of common law development that had led to the establishment of unanimous twelve-person juries in England and the colonies. For the Framers, the right to trial by jury was one of the natural rights of free men. George III's denial of the right to jury trial by the establishment of vice-admiralty courts, in the period from 1768 to 1774, had been one of the chief complaints against the English crown specified in the Declaration

of Independence. [2/] It is not likely that Madison, Jefferson, and the other Founders would have permitted such a fundamental alteration of the jury trial right as they knew it without considerable discussion and debate.

As Mr. Justice Harlan observed in his dissent in Williams:

> In the context of an amendment notable for its sparseness of language, a more likely explanation of the Senate's action is that it was streamlining the Madison version on the assumption that the most prominent features of the jury would be preserved as a matter of course. This interpretation of the events is supported by the fact that the only specifically objectionable feature of the common-law jury - the vicinage requirement - was pre-empted by language providing for a trial by a jury of the district, thus leaving the remaining attributes undefined in face of the distinct expectation that those charged with interpretation would look to the common law. Nor is this explanation rendered less forceful by the fact, noted by the Court, that "reception" of the common-law jury did not unfailingly mean 12 in

2/ "He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended Legislation: .... for depriving us in many cases of the benefits of Trial by Jury."

> early colonial times. As the Court itself acknowledges, the States that had constitutions in 1787 provided for juries of 12.
> 399 U.S. at 123, n. 9.

But even apart from the ultimatedly inconclusive argument over what the first Congress intended by deletion of the phrase "accustomed requisities" of the jury, positive evidence exists to prove that the Framers in fact did "equate the constitutional and common law characteristics of the jury." Williams, 399 U.S. at 99. In a case commonly accepted as the first instance of judicial review in the newly independent states, the Supreme Court of New Jersey held a state law providing for a six-person jury "unconstitutional," violating "the right of trial by jury."

The case, Holmes v. Walton, [3/] (1779), was an action for condemnation of goods obtained through commercial intercourse with the English. Under the 1775 law, providing for such seizure, either party

3/ See Austin Scott, "Holmes v. Walton: The New Jersey Precedent, 1779" 4 American Historical Review 456 (1899) in B. Schwartz, The Bill of Rights: A Documentary History, 405-410 (1971). As Scott sets forth, Holmes v. Walton is unreported, but the decision of the court and arguments of counsel have been amply reconstructed from historical sources. Id.

could demand a jury, which would consist of six men. The defendants appealed the verdict against them. Among the arguments raised by defense counsel were these:

> For that the jury who tried the said plaint before said justice consisted of six men only contrary to the constitution of New Jersey.
>
> For that proceedings and trial in the said plaint below, and the judgement thereon given were had contrary to the constitution, practices and laws of the land. 4/

The basis for these remarkable arguments was the Constitution of New Jersey, adopted the day independence was declared by the Continental Congress, July 2, 1776, which provided that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever." The assumption that the "right of trial by jury" included twelve jurors as part of its essential nature finds support in previous declarations of the rights of the colonists in New Jersey.5/ Eventually, in 1780, the

4/ Schwartz, supra n. 3.

5/ Chapter XXII of the West Jersey "Concessions and Agreements" of 1676: "The trial of all causes, civil and criminal shall be heard and decided by the verdict of twelve honest men of the neighborhood." The formal declaration of the "Rights and Privileges" passed by the House of East Jersey in 1699 also required that all trials be by a jury of twelve men. Two other acts of the assembly in each of the Jersey provinces show that the right to trial before a jury of twelve men was regarded as fundamental, notably the acts of November, 1681 in West Jersey, and March, 1683 in East Jersey. Schwartz at 407.

law under which the case was tried was declared unconstitutional by the New Jersey Supreme Court. Although the opinion of Chief Justice Brearly has been lost, a contemporaneous petition to the New Jersey House of Assembly complains that "the justices of the Supreme Court have set aside some of the laws as unconstitutional," and a motion made by defense counsel at a new trial of the Holmes case recited the previous holding that "a trial by six men is unconstitutional."

The case is important for two reasons. First, the notion of judicial review of legislative acts was not at that time generally accepted in the colonies, and, in fact, a great protest arose as a result of the claimed usuperation of power by the New Jersey Supreme Court. The New Jersey Court would hardly have embarked on the difficult and novel course of judicial review unless the law at issue, providing for six-man juries, was clearly and unequivocally in violation of the constitutional "right of trial by jury." As the New Jersey Supreme Court explained in 1804:

> This question [whether the court has power to control the operation of an act of the legislature upon the principle of its being contrary to the constitution] was brought forward in the case of Holmes vs.

Walton, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six-man jury, was repealed and a constitutional jury of twelve men substituted in its place. This then is not only a judicial decision but a decision recognized and acquiesced in by the legislative body of the State.[6/]

Second, three of the principals involved in Holmes v. Walton became leading figures in both the Constitutional Convention and in the First Congress. The author of the opinion, Chief Justice David Brearly, of the New Jersey Supreme Court, was a representative to the Philadelphia Convention that drafted the Constitution, and he signed the Constitution for New Jersey. William Paterson, the New Jersey Attorney General at the time of the decision, was a member of the Convention, one of the first Senators from New Jersey, and later a Justice of this Court. He also served on the Conference Committee that reconciled the language between the House and Senate versions of the Bill of Rights. Elias Boudinot, the

6/ B. Schwartz, supra n. 3.

successful attorney for the defendants in Holmes, later served in the first Congress where he participated in the House debates on the Bill of Rights.

These three men, fresh from the novel and controversial decision of the New Jersey Supreme Court declaring the six-man jury law unconstitutional, would plainly have done what the Williams court thought they did not do - "equate the constitutional and common law characteristics of the jury," Williams, 399 U.S. at 99. They would hardly have agreed, without debate, to a change in the definition of the word "jury" directly contrary to the definition their highest court had recently held was embodied in the word. The only possible conclusion is that urged by Justice Harlan in Williams: the Framers assumed that "the most prominent features of the jury," including its inclusion of twelve persons," would be preserved as a matter of course," 399 U.S. at 123, n. 9.

Of course, this Court is not bound by the expectations or assumptions of the Framers of the Constitution or the Bill of Rights. The great abstract phrases of the Constitution "due process of law," "equal protection of the laws," "cruel and unusual punishment," take their meaning from the "evolving standards" of a maturing society

Trop v. Dulles, 356 U.S. 86, 101 (1958). But the more specific, concrete terms of our basic charter should not lightly be stripped of their historical meanings. Terms such as "army" or "citizen" or "habeas corpus" or "jury" had specific common law or English antecedents, and must be "interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898). As Justice Harlan urged in Williams, the number twelve, coming as it did from 400 years of English common law development, was not "mere adornment." 399 U.S. at 125. "The right to trial by jury...has no enduring meaning apart from historical form." Id.

In this context, the approach of this Court in Williams and Johnson proceeded from the wrong premise and placed the burden on the wrong proponent. Given this Court's "limited role in a constitutional democracy," Colgrove v. Battin, 413 U.S. 149, 181 (1972) (Marshall, J., dissenting), it should require those who would depart from specific historical restraints on governmental power to justify the departure. Those who would retain the

protections in the Bill of Rights as the Framers passed them on ought not to carry the burden of justification thrust upon them in Williams. As Justice Marshall commented: "The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a constitution and making it up as one goes along." Id. at 181-82.

B. The Sixth Amendment Right To Trial By Jury Guarantees A Jury Of Twelve Persons Because A Twelve-Person Jury Is Essential To The Historical Functions Of The Jury.

This Court's decision in Williams was based in part upon "currently available evidence and theory on the effect of changes in jury size." 399 U.S. at 101. But, as the court recognized in Ballew, research undertaken subsequent to Williams strongly indicates that diminution of the jury below twelve significantly impairs the functioning of the jury. 7/ The Court has recognized four

7/ The studies include R. Lempert, Uncovering 'Nondiscernible' Differences: Emperical Research and the Jury Size Cases, 73 Mich.L.Rev. 643 (1975); S. Nagel and N. Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction to Convict, 1975 Wash.U.L.Q. 933 (1975); Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W.Res.

(footnote continued on next page)

central purposes in the Sixth and Fourteenth Amendments' jury trial provisions: (1) to provide a fair possibility for obtaining a representative cross-section of the community, Williams, 399 U.S. at 100; (2) to promote effective group deliberation, Id; Ballew, 435 U.S. at 234; (3) to insure accuracy of results, Id. at 234-5; and (4) to avoid serious detriment to the defendant, Id. at 236. Each of these functions have been undermined by the reduction in size of juries from twelve to six.

(1) Representative cross-section of the community

Simple mathematical calculations show that reducing the size of a jury from twelve to six will significantly reduce the members of minority groups that sit on juries. According to one study, the reduction in minority group representation on smaller juries is even larger than one would expect:

L.Rev. 529 (1971); S. E. Askin, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in Group Dynamics Research and Theory (2d Ed. 1960); Davis, Kerr, Atkins, Holt and Meek, The Decision Processes of a 6- and 12- Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 Journal of Personality and Psychology (1975). See generally, Ballew v. Georgia, 435 U.S. at 231 n. 10.

In asserting that there would be a negligible difference in the ability of 12-member and six-member juries to provide a representative cross-section of the community, the court ignored what is obvious to every social scientist: that when sampling from heterogeneous populations, sample size (12 versus 6) determines how well minority groups in the population will be represented. In sampling from a population stratified 90%/10%, for example, we can predict from our knowledge of sampling theory that 72% of 12-member juries will include one or more members of the minority, but but that only 47% of the 6-member samples will. Still, this is only a statistical prediction, and a sincere empiricist would want to see empirical evidence. In my own experiments on 12-member versus six-member juries I compared the number of large and the number of small juries that had one or more blacks present. Blacks composed 10% of the population from which these jurors were drawn. Instead of the 72% to 47% contrast predicted, I found an 82% to 32% difference. Not many people would term this difference "negligible." M. Saks, "Ignorance of Science is no Excuse," 10 Trial 18, 19 (Nov.-Dec. 1974)(footnote omitted).

Professor Saks' Studies were cited by the court in Ballew, see, e.g., 435 U.S. at 231 n. 10, 237 n. 28.

This result was confirmed in another study, which observed that "because blacks are likely to be under-represented in the sampling frame from which jurors' names are drawn (e.g., voting lists), the degree of under-representation apparent to black parties before courts is likely to be greater than these figures suggest." 8/ And because of the smaller numbers of minority group jurors, racially motivated preemptory challenges will more effectively, and quickly, create all-white juries when juries have fewer members. 9/

Moreover, any doubts about the proper size of the jury should be resolved in favor of twelve-person juries in order to make present-day juries the functional equivalent of common law juries. Indeed, from that functional perspective, a strong argument can be made that juries of more than twelve persons would be required in order to serve the same cross-section of the community function served by juries at common law. A twelve-member jury constituted a much more substantial segment of

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8/ Lempert, supra n. 7, at 669 n. 77.

9/ Minority group members are tried for criminal activity in proportion far exceeding their proportion of the population. See, e.g., Uniform Crime Reports, 1975; Silberman, Criminal Violence, Criminal Justice (1978).

the communicy in 14th Century rural England, or even in London, than does a twelve-member jury in New Orleans today. The population of the United States has grown over fifty times since 1790, and yet we still select, at most, only twelve jurors to represent a fair cross-section of that greatly expanded community.

Amici do not suggest that juries of more than twelve persons are constituitonally required. We do suggest, however, that authorizing juries of less than twelve persons is inconsistent with the function of juries at common law, and that doubts about the proper size of juries should be resolved with attention to the function of the jury, and therefore in favor of twelve-person juries.

(2) Effective Group Deliberation

Studies of the dynamics of group decisionmaking have shown that "there were no conditions under which smaller groups were superior in the quality of group performance and group productivity." Ballew, 435 U.S. at 233, n. 11. As a group is reduced from twelve to six, there are fewer members to make the necessary contributions to solve the problems before them. "As juries decrease in size, then, they are less likely to have members who remember each of

the important pieces of evidence or argument." Id. at 233. Moreover, bias in a smaller group is less likely to be overcome both because there is less group pressure, and because there are likely to be fewer minority group members.

As this Court noted in Ballew, id. at 232, "At some point this decline [in size] leads to inaccurate factfinding and incorrect application of the common sense of the community to the facts." Available studies, cited with approval in Ballew, demonstrate that the erosion of effective deliberations is even greater from twelve to six than from six to five; since the Court has found the latter erosion of constituitonal magnitude, it should review and reverse the decision in Williams, finding the greater erosion constitutionally insubstantial.

(3) Insuring Accuracy of Results

Almost every post-Williams study has concluded that reducing the size of juries from twelve to six will make a difference in jury decisions. As the Court pointed out in Ballew, 435 U.S. at 234-35, one study showed that twelve-person juries reached "correct" conclusions in 83% of the cases before it, while six-person juries came to the "correct" conclusion in only 69% of the

cases. 10/ This Court's summary observes the following other changes:

> Working with statistics described in II. Kalven & II. Zeisel, The American Jury 460 (1966), Nagel and Neef tested the average conviction propensity of juries, that is, the likelihood that any given jury of a set would convict the defendant. They found that half of all 12-person juries would have average conviction propensities that varied by no more than 20 points. Half of all 6-person juries, on the other hand, had average conviction propensities varying by 30 points, a difference they found significant in both real and percentage terms. Lempert reached similar results when he considered the likelihood of juries to compromise over the various views of their members, an important phenomenon for the fulfillment of the commonsense function. In civil trials averaging occurs with respect to damages amounts. In criminal trials it relates to numbers of counts and lesser included offenses. And he predicted that compromises would be more consistent when larg juries were employed. For example 12-person juries could be expected to reach extreme compromises in 4% of the cases, while 6-person panels would reach extreme results in 16% All three of these post-Williams studies, therefore, raise significant doubts about the consistency and reliability of the decisions of smaller juries. Ballew, 435 U.S. at 235 (footnotes omitted).

10/ Saks, supra p. 19, at 86-87.

And another leading study analyzed the significant extent to which jury size affects jury verdicts as follows:

> Assume that a twelve-member jury has been drawn and that seven or more of its members hold attitude X. If one dismisses that jury and draws a jury of six members from the same population, what is the probability that four or more members of the smaller jury will hold attitude X? The best estimate is about 77 per cent; thus, where a jury's decision may be traced to the attitudes with which its members view a problem, the verdict is a six-member jury drawn randomly from a population will differ from the verdict rendered by a twelve-member jury drawn from the same population about 23 per cent of the time. Adding these cases of expected divergency (23 per cent of the 20.3 per cent of cases in which judge-jury disagreement was attributable to additional differences, or 4.7 per cent of the total sample) to the previous minimum estimate of 9.4 per cent produces a final estimate of 14.1 per cent as the proportion of cases in which jury size has a reasonable probability of affecting jury verdicts. Lempert, supra n. 6, at 651-53 (footnote omitted)

(4) Detriment to the Defendant

The most serious problem, as noted above, is the greater possibility that truly innocent defendants will be found guilty as a result of the change in jury size. Once again, the post-Williams studies

studies find that reduction in jury size substantially increases the risk of erroneous conviction:

> [I]n the course of 1000 trials, 21.3 innocent defendants are likely to be convicted by a six-person jury, while only 20 innocent defendants are likely to be convicted by a twelve-person jury. That 1.3 difference represents a 6-1/2 percent increase over 20 defendants, or a six percent decrease from 21.3 defendants. It does sound socially undesirable to increase the number of innocent defendants convicted by 6-1/2 percent. It sounds even worse to note that the probability of convicting an innocent defendant goes up from 0.40 to 0.427 when a jurisdiction changes from a twelve-person jury to a six-person jury. That is almost a seven percent increase in the possibility of an innocent person being convicted (0.027/0.40). Conversely, someone concerned about not convicting the guilty might note that the probability of a guilty defendant not being convicted rises from 0.284 for a six-person jury to 0.297 for a twelve-person jury. That represents an increase of almost five percent (0.013/0,284). Nagel and Neef, supra n. 7, at 959-60.

Other studies come to the same conclusion based on slightly different approaches. Hans Zeisel has shown that the number of hung juries dramatically decreases when the jury size is reduced from twelve to six. There are hung juries on a national average in about 5% of the cases heard by twelve-

person juries. However, in Florida, when six-person juries are used, the number of hung juries was reduced to 2.4%. 11/

This change is especially crucial, and it demonstrates how severely the constitutional right of trial by jury has been impaired by Williams. Our criminal justice system has been predicated on the judgment that, in Blackstone's famous phrase, "it is better that ten guilty persons escape than that one innocent suffer." 12/ But the change in jury size significantly affects the results reached by juries, and leads to fewer hung juries, more convictions, and the inevitable conviction of significant numbers of innocent defendants.

C. The Sixth Amendment Right To Trial By Jury Guarantees Unanimity In Jury Verdicts.

It is hardly necessary for amici to attempt to persuade the Court that unanimity is an essential attribute of the historical

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11/ Zeisel, ...And Then There Were None: The Diminution of the Federal Jury, 38 U. of Chic.L.Rev. 710, 720 (1971). Another study has demonstrated the mathematical basis for this result. See The Effect of Jury Size on the Probability of Conviction, supra n. 6 at 547.

12/ 4 W. Blackstone Commentaries 358.

right of trial by jury, for a majority of the Court has consistently and resolutely upheld precisely that view. Indeed, in both Johnson and Apodaca, a majority of the court agreed that unanimity was "one of the essential attributes subsumed under the term" "jury trial." See 406 U.S. at 370, n. 6 (Powell, J., concurring); 406 U.S. at 381-83 (Douglas, Brennan, and Marshall, JJ., dissenting); 406 U.S. at 395 (Brennan and Marshall, JJ., dissenting); 406 U.S. at 397 (Stewart, Brennan, and Marshall, JJ., dissenting); 406 U.S. at 414 (Stewart, Brennan, and Marshall, JJ., dissenting). 13/ A majority of the Court has

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13/ The judgments in Apodaca were particularly anomalous, for different majorities of the Court in that case agreed that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and that the right to jury trial guaranteed by the Sixth Amendment was to be enforced against the states according to the same standards protecting the federal right. However, Mr. Justice Powell, who did not agree that the Sixth Amendment standards applied to the states, joined the plurality and voted to affirm the judgments. Nevertheless, in some sense, as Mr. Justice Brennan observed, the opinions in Apodaca and Johnson were consistent with "a holding that only a unanimous verdict will afford the accused in a state criminal prosecution the jury trial guaranteed him by the Sixth Amendment. 406 U.S. at 395 (Brennan, J., dissenting.

never wavered from the view that the jury right protected by the Framers was a right to a unanimous jury. Id. That frequently repeated view is amply supported by the records of ratification. As is well known, the Constitution was finally ratified in the requisite number of states only after its proponents agreed that a Bill of Rights would be quickly added to it to protect the lives and liberties of all citizens against arbitrary power by the federal government. In many of the state ratifying conventions, proposed amendments were introduced showing the type of protection expected.

The most important debates on ratification, producing the Federalist Papers, took place in New York, the most populous state at the time and one whose adherence was geographically necessary to make the existing group of states into a single nation. One section of the New York proposed amendments focused specifically on the need for unanimous jury verdicts, and provided

> That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United

> States and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. 14/

When the New York convention voted to ratify the Constitution on July 26, 1788, by a vote of 30 to 27, the agreement of the Federalist supporters to introduce quickly a group of amendments along the lines of the New York proposals was crucial in securing the necessary votes. In this light, it is simply unthinkable that the First Congress would propose an amendment on the right of trial by jury, dispensing with the unanimity requirement, without a word of protest by any member of the New York Congressional delegation. The only conclusion to be drawn is that, while the language of the Sixth Amendment was modified and simplified, there was no thought of changing the sturcture of the jury as the Founders had always known it - a body acting unanimously to determine a person's guilt or innocence.

14/ B. Schwartz, supra n. 4, at 911-12; Documentary History of the Constitution of the United States, Volume 2, pp. 190-202.

D. The Sixth Amendment Right To Trial By Jury Guarantees Unanimity In Jury Verdicts Because Unanimity Is Essential To The Historical Functions Of The Jury.

Almost uniformly, scholarly work on jury unanimity has found that if a minority position is asserted in a situation where its adherent's vote is not necessary to decide the question, then the majority will largely ignore it. Put another way, if they do not have to do so, a majority will give only the most cursory consideration to minority views. One study inquired whether juries not bound by the rules of unanimity would conscientiously and comprehensively discuss the views of minority members:

> [T]here were 36 juries which were assigned a nonunanimous rules. Of this number, 26 had a two-thirds majority on their first poll without achieving unanimity. Among these 26 juries, 9 juries (35%) decided immediately upon the majority position. Several more (4) of these juries deliberated for only a very short time (5 minutes or less) after the first poll and then outvoted a minority. Only 6 of these juries deliberated for more than 10 minutes, and all of these out-voted an unconvinced minority. These data suggest that the increased speed of deliberation found for the juries assigned a non-unanimous rule may have resulted

> from cursory consideration of dissenting views. We would naturally hope and expect that real jurors would be more conscientious than our student mock jurors, but these data raise interesting questions about the Court's sanguine view of jury deliberation. Davis, Kerr, et al., supra n. 7, at 12.

The decisions permitting non-unanimous juries in Johnson and Apodaca relied, as had the decision in Williams, on social science data which seemingly showed that unanimity was not indispensible to the proper functioning of the jury system. But just as recent studies cast sharp doubt on the premises underlying Williams, they cast doubt on Johnson and Apodaca as well. Indeed, the requirement of unanimity is more crucial in preserving the traditional common law conception of jury trial than the requirement of twelve jurors, for elimination of the unanimity requirement significantly reduces the likelihood of meaningful jury debate:

> a majority verdict requirement is far more effective in nullifying the potency of minority views than is the outright reduction of jury size equivalent to the majority that is allowed to agree on a verdict. 15/

15/ Zeisel, supra n. 11, at 722.

Professor Zeisel has concluded that while reducing the number of jurors was a "jury enfeebling measure," abandoning the requirement of jury unanimity is "reduction with a vengeance." 16/

Various studies have been made of the difference in results between six-person juries acting unanimously and twelve-person juries acting by ten to two votes. In a significant number of instances, the larger jury acting by majority vote was more likely to convict than the smaller, but still unanimous jury:

> Note that the probability of conviction for the unanimous 12 out of 12 verdict stays relatively low throughout a wide range of apparent guilt (first reaching 50% at about 95% apparent guilt) approximating the ideal situation of no conviction as long as there is a reasonable doubt of the individual's guilt. Of course, society therefore runs a risk that many individuals who are indeed guilty (in the actual, not legal, sense) are likely to be convicted with this system. The 10 out of 12 criterion leads to a much different picture with the curve rising very sharply to a 50% probability at level of 78% apparent guilt. Compared to the 12 out of 12 criterion, a defendant under a 10 out of 12 criterion is 8 times

16/ Zeisel, supra n. 11, at 722.

> more likely to be convicted at 80% apparent guilt and 3 times more likely at 90% apparant guilt. The conviction patterns for an 11 out of 12 and a unanimous 6 out of 6 criterion are similar and are intermediate between the 12 out of 12 and 10 out of 12 results. Friedman, Trial by Jury: Criteria for Convictions Jury Size and Type I and Type II Errors, 26-2 Am. Stat. 21, 22 (April 1972).

Nagel and Neef, supra n. 7 at 976-977, came to the same conclusion using a different approach. Based on their premises, "an innocent person has a 92% chance of being convicted under a 10/12 rule, whereas Table 2 indicates that such a person has only a 63 percent chance of being convicted under a 6/6 rule." They continue:

> [A] 10/12 rule will always result in a higher probability of the innocent being convicted than a 6/6 rule.... Intuitively, one might believe that the probability of convicting an innocent person under a 6/6 rule is greater than under a 10/12 rule, because only six persons have to be convinced of guilt under the 6/6 rule, but ten have to be convinced under the 10/12 rule. That kind of reasonable thinking, however, does not adequately consider how much easier it is not to have to convince everybody on a jury, even though the total number of decision-makers is somewhat larger. Id.

Zeisel agrees that a jury of twelve that acts through a ten to two majority vote is far less likely to have a minority group presence that can effect the outcome:

> Looking first at the 100 twelve-member juries, we expect to find 38 juries with one minority representative, 23 with two, and 11 with three or more. If these twelve-members juries must be unanimous to reach a verdict, the majority will have to reckon with at least one minority member in 38 + as + 11 = 72 out of the 100 cases. If these juries are permitted to reach a verdict by agreement of ten jurors, than the majority will be able simply to disregard the minority position in 38 + 23 = 61 of the 72 cases. Only in the 11 cases in which we must expect three or more minority jurors will they be able to influence the verdict.
> Zeisel, supra n. 11, at 723.

These studies, based upon statistical analysis, probability theory, and other social science analysis, indicate that the various "jury enfeebling" measures do, indeed, make a difference. An appreciably larger number of persons will be convicted under a majority rule procedure. Necessarily a larger number of innocent persons will be caught up in this greater conviction rate. Whatever one can say about the

need for saving money in empaneling smaller juries or the greater efficiency in a majority vote system, such a significant change in our jury structure surely needs more justification from those who would alter a procedure relied on in Anglo-American law for over 500 years for determining guilt and innocence.

II. IN THE ALTERNATIVE, A STATE MAY EITHER REDUCE THE SIZE OF A JURY OR PROVIDE FOR CONVICTION BY A SUBSTANTIAL MAJORITY, BUT IT MAY NOT DO BOTH.

We have argued above that both jury enfeebling devices employed by the state of Louisiana are unconstitutional. If this Court decides that either one of them is invalid, then the conviction must be reversed.

But even if their Court does not overrule Williams or Johnson and Apodaca, it does not have to accept a procedure that aggravates all the problems connected with each of the modifications of the jury. The difference between unanimous conviction by a twelve-member jury and a conviction by five members of a six-member jury are too obvious to ignore. When this Court accepted the six-member jury in Williams, it emphasized that a unanimous vote was required. 399 U.S. at 100. It upheld the ten of twelve and nine of twelve convictions in Johnson and Apodaca only by the slimmest of margins, and without the benefit of many of the later studies relied on in Ballew. To continue the move down "the slippery slope" would seriously alter a system devised in far more uncivilized times to insure fairness in the state's application of the criminal law.

Conviction by a non-unanimous six-member jury entails all of the defects of both of the earlier modifications in aggravated form. In terms of obtaining a fair cross-section of the community, the Louisiana system necessarily would have fewer and fewer minority group members or members with a minority point of view, and those members are more easily struck by peremptory challenges before empanellment. In terms of group deliberation, the other members of the smaller jury would simply not have to consider that point of view if they did not need the last vote for conviction. Saks has found an "enormous" difference between larger and smaller non-unanimous juries:

> Each of the studies...found that it is the absolute rather than the relative size of the opposition that determined factional influence, and that having an ally (10-2) as compared to having no ally (5-1) makes an enormous difference. This is a classic and well known finding in social psychology research on conformity. The presence of an ally is one of the most powerful known facilitators of minority resistence to conformity pressure.
> Saks, supra p. 19, at 19.

These findings lead inevitably to the conclusion that five to one verdicts will

impair the accuracy of verdicts to the appreciable detriment of defendants. The unanimous vote of a twelve-member jury is the standard required by the Sixth Amendment for all federal criminal juries: the appreciable change in jury functioning and results entailed by a five to one verdict so far depart from that standard as to violate any norms of due process or jury trial rights.

Finally, it should be noted that a five to one verdict will allow five persons to convict an individual, a conclusion at odds with this Court's decision in Ballew condemning a unanimous vote by a five-member jury; yet studies cited above plainly indicate that the unanimous vote is more protective of a defendant's rights. The conviction here is plainly at odds with this Court's reasoning and analysis in Ballew.

CONCLUSION

The tinkering with the jury system that a few states have undertaken is not merely "an experiment," and the states are not merely acting as laboratories for differing forms of criminal justice reform. The experiments involved here are not at the fringes of the system, such as differing rules on the presence of attorneys in

grand jury rooms or on the scope of preliminary hearings. The alterations of the traditional rules of jury size and unanimity strike at the heart of the jury function which for centuries has kept the entire criminal justice system operating as a bulwark against tyranny and governmental overreaching.

For the reasons noted above, the judgment below should be reversed.

Respectfully submitted,

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